IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

RFA.No. 243 OF 2005()

OS.22/1993 OF SUB COURT,NEYYATTINKARA

APPELLANTS/DEFENDANTS 1 & 2:

1. FRITZ T.M., CLEMENT,
SON OF THOMSON, K.S.E.B. EMPLOYEE,
VIJAYA BUILDINGS, MOOLAKONATHU-MARANALLOOR
VILLAGE, KOOVALASSERY P.O., NEYYATTINKARA TALUK,
TRIVANDRUM DISTRICT.

2. T.M.FRANCIS JESTUS,
SON OF THOMSON, DRIVER, HEALTH SERVICES,
RESIDING AT VIJAYA BUILDINGS, MOOLAKONATHU-
MARANALLOOR VILLAGE, KOOVALASSERY P.O.,
NEYYATTINKARA TALUK, TRIVANDRUM DISTRICT.

BY ADV. SRI.R.RAJESH KORMATH
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SMT.M.R.MINI
SMT.SANJANA R.NAIR
SRI.JAYKAR.K.S.
SRI.RAHUL VARMA
SRI.V.S.ROBIN

RESPONDENTS/PLAINTIFFS 1 & 2:

1. SUDHAKARAN NADAR,
SON OF SUBBAYYAN NADAR, AGED 45,
KAVITHA NILAYAM, KIDARAKUZHI, VENGANOOR DESOM,
VIZHINJAM VILLAGE, VENGANOOR P.O.

2. VIJAYAN, SON OF CHELLAYYAN NADAR,
AGED 51, CONTRACTOR, KINARUVETTIYAVILA VEEDU,
KIDARAKUZHI, VENGANOOR P.O.

BY ADV. SRI.R.T.PRADEEP
SRI.V.VIJULAL

THIS REGULAR FIRST APPEAL HAVINGCOME UP FOR ADMISSION ON 03/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

C.M. APPL. 601/2005 & R.F.A. 243/2005

DATED THIS, THE 3RD DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

C.M. Appln. 601/2005 is filed seeking condonation of the delay of 646 days in filing the first appeal. The reason for the delay is explained in the affidavit filed in support of the application. It is averred that though the case bundle was entrusted with the counsel for preparing the appeal in time, the bundle was misplaced which happened to be traced out only in 2005. After entrusting the case in 2003, the deponent appellant had not made any enquiries till 2005 as to what happened to the appeal is rather improbable to be believed. At the same time, since the delay is stated to be due to the misplacement of the case bundle in te office of the Advoace with whom the matter was entrusted and taking a lenient view, we condone the delay.

2. Since the parties have already entered appearance in the application for condonation of delay, the appeal itself was taken up and heard.

3. The appeal is fileld against the judgment passed by the court

below pursuant to the order order of remand in A.F.A. 16/2002. The suit was one for declaration of right, permanent injunction and other reliefs. The appellants are defendants 1 and 2 in the said suit. The suit was decreed. The appellants have filled a counter claim for passage fee as well as quarrying fee. The court below allowed passage fee in part, but did not advert to the claim regarding quarrying fee. As against the judgment and decree passed by the court below, A.S. 84/1995 was filed by the appellants herein which was allowed and the decree passed by the court below was set aside and the suit was dismissed. Both sides preferred appeals before this Court as A.F.A. Nos. 16 and 36/2002. A.F.A. 16/2002 was preferred by the appellants herein and AFA 36/2002 was preferred by the plaintiff. The Division Bench concurred with the view expressed by the learned Single Judge and dismissed AFA 36/2002 filed by the plaintiff. However, A.F.A. 16/2002 filed by the appellants herein was allowed partly by remanding the suit to the trial court for considering the counter claim preferred by the appellants herein. Pursuant to the remand order, the court below has passed the present judgment which is impugned in this appeal.

4. According to the learned counsel or the appellant the court below did not consider the counter claim regarding passage fee and according to him, in the earlier appellate order there was an open remand for

consideration of the claim including the passage fee. We have gone through the common judgment rendered in AFA Nos. 16 & 36/2002 to find out as to whether the remand was an open remand as contended by the learned counsel for the appellant. In para 8 of the judgment, this Court referred to the counter claim filed by the appellants (defendants 1 and 2) against the plaintiffs, which is reiterated as follows:

> "A counter claim has been filed by defendants 1 and 2 before the court below against the plaintiffs. The lower court though settled six issues, the third issue was only relating to the amount that the defendants are entitled to realise as passage fee for each lorry load and not on the quarrying fees. No separate issue regarding the contentions of the counter claim is also seen settled by the court below. The discussions contained in the lower court judgment clearly show that the learned Sub Judge dealt with only the passage fee for using plaint B schedule pathway and has not considered the quarrying fee that the defendants 1 and 2 are entitled for quarrying in 20 cents of property belonging to them which constitute the plaint A schedule property, extending to 45 cents, including that of the 25 cents of property of the 1st plaintiff."

Thereafter, in para 13 it is observed as follows:

> ".....Therefore, we are inclined to remand the case only for the consideration of the counter claim of defendants 1 and 2."

5. We have gone through the entire judgment and find that there was

no argument raised regarding quantum of passage fee as allowed by the court below as insufficient or any contention thereof. There was no consideration regarding the insufficiency or otherwise of the passage fee as awarded by the court below. Therefore, the passage we have extracted as above would clearly show that the court was concerned with the non consideration of the counter claim for quarrying fee. On a reading of the judgment it is abundantly clear that the remand was confined to the question concerning the counter claim of defendants 1 and 2.

6. We are unable to agree with the contention now raised by the learned counsel for the appellant. The court below has rightly understood the scope of the remand as one for deciding the counter claim preferred against the quarrying fee. Since passage fee was already considered and allowed earlier, that will stand.

In the circumstances, the appeal is dismissed.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-